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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-863

COLUMBIA BROADCASTING SYSTEM, INC.,
Petitioner,

v.

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Respondents.

No. 71-864

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Petitioners,

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE, *et al.*,
Respondents.

No. 71-865

POST-NEWSWEEK STATIONS, CAPITAL AREA, INC.,
Petitioner,

v.

BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE, *et al.*,
Respondents.

No. 71-866

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner,

v.

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF NATIONAL BROADCASTING COMPANY, INC., AS *AMICUS CURIAE*

This brief is submitted on behalf of National Broadcasting Company, Inc. ("NBC"), as *amicus curiae,* in support of the position of petitioners in these actions seeking reversal of judgments of the United States Court of Appeals for the District of Columbia Circuit entered on August 3, 1971.

Opinions Below

The opinion of the Court of Appeals is reported at 450 F.2d 642 (D.C. Cir. 1971). Opinions of the Federal Communications Commission reversed by the Court of Appeals are reported at 25 F.C.C.2d 216 (1970) and 25 F.C.C.2d 242 (1970).

Jurisdiction

Judgments of the Court of Appeals were entered on August 3, 1971 and reissued on October 29, 1971. The petition of the United States of America and the Federal Communications Commission for a writ of *certiorari* in *FCC* v. *Business Executives' Move for Vietnam Peace* (hereafter *BEM*) and *FCC* v. *Democratic National Committee* (hereafter *DNC*) was filed on January 3, 1972; the petition of intervenors American Broadcasting Companies, Inc., and Columbia Broadcasting System, Inc. for writs of *certiorari* in *DNC* were filed on January 3, 1972; and the petition of Post-Newsweek Stations, Capital Area, Inc. for a writ of *certiorari* in *BEM* was filed on January 3, 1972. All the petitions for *certiorari* were granted on February 28, 1972 and the cases consolidated for hearing by this Court. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Consent of the Parties

All the parties to the proceedings below have given their consent to the filing of this brief and their letters of consent are on file with the clerk of this Court.

Question Considered in This Brief

Whether, consistently with the First Amendment, the government may compel a broadcast licensee which has complied with the fairness doctrine to sell editorial advertising time to a party seeking to purchase such time.

Constitutional Provision

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Interest of the *Amicus*

NBC was prepared, in the exercise of its discretion (A. 47),* to sell time to the Democratic National Committee.** It was thus not a party to the *DNC* case. Nor was it involved in the *BEM* action. NBC played no role in these proceedings until the opinion of the Court of Appeals was rendered. It is that opinion, couched as it is in terms of

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* References to "A. ——" are to the relevant pages of the Appendix before this Court.

** After advising the Democratic National Committee that NBC would make available for purchase by it of a prime time period on the NBC Television Network, NBC was advised that the Democratic National Committee did not wish to proceed with the purchase of time. (A. 47)

a supposed constitutional *requirement* that speakers have personal access to advertise on television, that occasions the submission of this brief. In our view, that which the majority of the Court of Appeals referred to as the "modest reform" effected by its opinion (A. 482) is nothing less than a most immodest incursion into the First Amendment.

Statement

NBC adopts as its Statement the material set forth in the equivalent section of the brief of the United States of America and the Federal Communications Commission.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO THE FIRST AMENDMENT.

Introduction

The BEM decision is, in our view, incorrect and insupportable on a variety of grounds, any one of which would suffice to warrant reversal. The validity of the decision is, for example, totally dependent upon what we believe to be its extravagantly broad reading of the concept of "state action" by which broadcast stations are transformed into the equivalent of state owned and operated stations. Disagreement by this Court with the Court of Appeals as to this issue—as argued at length in the persuasive briefs submitted by petitioners in 71-863, 71-865 and 71-866,*—would itself lead to reversal.

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* We deal with the issue briefly, *infra*, pp. 15-17, in our discussion of the inapplicability of *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) to the instant action.

Similarly, disagreement by this Court—as urged by the United States and the FCC in 71-864—with the unwillingness of the Court of Appeals to grant any deference in this case to the administrative expertise of the FCC should also lead to reversal.

In this brief, we focus on the constitutional analysis of the Court of Appeals which we believe to be basically at odds with the First Amendment.

Television as Press

This case involves fundamentals and we start with the fundamental position that broadcasting is part of the press protected by the First Amendment. This Court has so held, *United States* v. *Paramount Pictures,* 334 U.S. 131, 166 (1948), and it is now difficult to imagine a contrary holding.* Thus, in the libel area, the line of cases commencing with *New York Times* v. *Sullivan,* 376 U.S. 254 (1964) has been applied with equal vigor to cases involving broadcasting. *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971); *St. Amant* v. *Thompson,* 390 U.S. 727 (1968). And in the cases currently pending before this Court relating to the First Amendment right of journalists not to disclose their confidential sources, none of the courts below, nor counsel, has suggested that any different result could properly flow from the fact that one of the cases now pending (*In the Matter of Pappas,* 266 N.E.2d 297 (Mass.), *cert. granted,* 402 U.S. 942 (1971)), involves

* Many years have passed since the Federal Radio Commission contended in court that broadcasting, since it involved electronic reproduction of speech, was not itself protected under the First Amendment. See, Brief of Commission in *Trinity Methodist Church South* v. *Federal Radio Commission,* 62 F.2d 850 (D.C. Cir. 1932) at pp. 47-49. Such arguments are not now to be heard from the FCC. What is striking is that arguments to that end are now proferred by respondents—all, we are told, in the name and spirit of the First Amendment.

a television newsman, while the other two involve journalists employed by newspapers (*United States* v. *Caldwell*, 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971) and *Branzburg* v. *Hayes*, 461 S.W. 2d 345 (Ky. 1970), *cert. granted*, 402 U.S. 942 (1971).

That television should receive essentially similar First Amendment protection as newspapers arises from the fact that both perform similar First Amendment functions. Senator Ervin, at the opening of recent hearings of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, aptly observed that:

> "While the Founding Fathers did not contemplate the media of a radio and television when they wrote the First Amendment, their reasons for protecting the printed press from Government control apply equally to the broadcast media . . . If First Amendment principles are held not to apply to the broadcast media, it may well be that the Constitution's guarantee of a free press is on its death bed . . ." (Hearings, Subcomm. on Constitutional Rights of the Senate Judiciary Comm., 92nd Cong., 2d Sess. —— (1972).

NBC News correspondent Bill Monroe put the issue succinctly in his recent testimony before the Ervin Subcommittee. Mr. Monroe, comparing the print press and the broadcast media, observed:

> "The fantastic new technology and sudden impact of television may have misled us about its most vital function. Seeking to fit it into familiar categories, some of us have been impressed with the size and wealth of television, and have put it down as big business. Some of us have been impressed with its evening parade of singers, dancers, actors and comedians, and have put it down as the new vaudeville. But those

nervous pictures that bring the White House, Capitol Hill, Vietnam and London into our living rooms don't strike us immediately as the new front page. So we have missed the main fact about television: it *is* press. And if television and radio spend more time on entertainment and commercials than on news, so, in fact, do many newspapers with their acres of advertising, their sports pages, gossips, astrologists, advice to the loveless and fat Sunday editions with the news tucked inside the colors of Dick Tracy and Peanuts. Radio and television are, at bottom, instantaneous, warm-blooded press. Like the printed press, they carry the flesh of commerce and entertainment on a hard skeleton of news. And, like the printed press, they *are* massively engaged in exactly that kind of communication which the First Amendment was written to protect." (Emphasis in original.) (*Id.* at ——.)

The Nature of a Free Press

The First Amendment was drafted to protect the public from what human experience teaches will be the likely result of the power of *government* over speech and press. Fear of government prompted those who desired a Bill of Rights to insist upon its incorporation with the Constitution.* The same concern led Madison, draftsman of the Bill of Rights, to observe in the debates in the House over its

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* Jefferson, who would have opposed ratification of the Constitution without the addition of a Bill of Rights, wrote from Paris to Madison during the debates over ratification of the Constitution, that:

> "A bill of rights is what the people are entitled to against every government on earth, general or particular [that is, Federal or state], and what no just government should refuse, or rest on inferences." IV P. L. FORD, *Writings of T. Jefferson* 477 (1904).

See, *e.g.*, *O'Neil* v. *Vermont*, 144 U.S. 323, 370 (1892) (Harlan, J., dissenting).

adoption, that its purpose was to guard against the possibility of "abuse of powers of the General Government". For this reason, Madison stated, "the liberty of the press [was] expressly declared to be beyond the reach *of this Government.*" 1 ANNALS OF CONGRESS 432, 737 (1834). (Emphasis added.)

Press was thus intended to be independent of government and, indeed, to serve not merely as a conduit of information or views, but a critic and gadfly, especially of government. This role of the press was well defined by this Court in *New York Times* v. *Sullivan, supra,* by reference to Madison's report on the Virginia Resolutions:

> "Earlier, in a debate in the House of Representatives, Madison had said: 'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.' 4 Annals of Congress, p. 934 (1794). Of the exercise of that power by the press, his Report said: 'In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands . . . .' 4 Elliot's Debates, *supra,* p. 570 . . . ." (376 U.S. at 275)

This Court has thus condemned over the years, not merely governmental action overtly suppressing the expression by the press of particular views, but the subtlest of governmental influences which might mute the press in the slightest degree or discourage it, even minimally, from performing its role. "Freedoms such as [speech, free press] are protected not only against heavy-handed frontal

attack, but also from being stifled by more subtle governmental interference." *Bates* v. *Little Rock*, 361 U.S. 516, 523 (1960). See, *e.g.*, *Mills* v. *Alabama*, 384 U.S. 216 (1966); *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936).

The essential teaching of the First Amendment is that it is in the public interest that the press be free. As Reuven Frank, NBC News president, has observed:

> "Of course, the free press, we will be told, but a free press means a responsible press, a constructive press, a patriotic press, an even-handed press, a restrained press—all the noble words used to describe the press in the official utterances and even the constitutions of every dictatorship in the world, of right or left. A free press, they will tell us, is a press which deserves to be free. That is what President Nyerere said when he fired the editor of the *Dar es Salaam Standard;* that is what Prime Minister Lee Kuan Yew said when he shut down the *Singapore Herald.* But 200 years ago Americans knew that it was not that the press deserved to be free, but that the people could not be free unless the press were free." (Speech of Reuven Frank, November 11, 1971, quoted in Abrams, *The People's Right to Know: The Legal Maze*, 8 TRIAL 20, 31 (1972))

What was guaranteed by the First Amendment, then, was a press free enough to decide for itself what to print. The *BEM* decision is to the contrary. The decision inexorably places the government—through the FCC and the courts—at the heart of the decision making process as to *which* editorial advertisements shall be broadcast. Unless time to telecast editorial advertisements must now be sold (as Commissioner Johnson has proposed)* on a first-come, first-serve basis—thus placing a premium on the speed with

* A. 281.

which the affluent rush to set the agenda for public debate* —ultimately the decision as to which advertisement will be telecast will have to be based upon the exercise of judgment. The question, of course, is whose judgment. To the extent government is placed in a position of overseeing, of ruling on the exercise by broadcasters of their judgment and, indeed, of second-guessing that judgment, its role could not help but be central to the decision making process. That this would be the result of *BEM* is evident from Judge Wright's decision itself which indicates that the Commission is apparently now to issue "reasonable regulations" (A. 483-84) relating to the amount and placement of editorial advertisements (A. 484); to prevent "domination by a few groups or a few viewpoints" (A. 485); and the like. Apart from these decisions, who is now, after *BEM*, to decide whether advertisements may be rejected because of poor technical quality, or because they are or border on the obscene or, indeed because they are beyond the bounds of normally accepted taste? Who is to decide whether criticism of the government itself on one or more issues has been adequately presented? In short, is the decision maker to be the broadcast licensee or—on review—the government?

---

* The Commission observed in its *BEM* decision that:

"Further, the public's agenda for discussion of public issues would then be set substantively and increasingly by the affluent —by the person or group which '. . . has the financial resources and interest to purchase sustained access to the mass communications media . . .' (*Banzhaf* v. *F.C.C.*, 405 F.2d 1082 (C.A.D.C. 1968), *cert. den.*, 396 U.S. 842). Since the amount of broadcast time for discussion of controversial issues is limited and since the licensee must afford reasonable opportunity for discussion of both sides, the purchase of substantial blocks of time for a campaign by, say, the oil industry to discuss the issue of the oil depletion allowance would impose the burden to present reasonably the other viewpoint, and in turn would inevitably cut down on the amount of time for discussion of other issues." (A. 17)

BEM, we submit, places the government in the ultimate decision-making role as to each such issue.

Whatever the issue, "reasonableness" after *BEM* is inevitably to be determined by one branch of government—the Commission—with appeals taken to another branch—the courts—to determine if the Commission's action in this area is itself reasonable. All this is to be done by the government, all, we are told, to vindicate interests set forth in the same First Amendment that Madison drafted to place "the liberty of the press . . . beyond the reach of this Government." 1 ANNALS OF CONGRESS 737 (1834). It is to be done by the same government that Justice Brandeis warned against in his observation that "experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." *Olmstead* v. *United States*, 277 U.S. 438, 479 (1928) (dissenting opinion)

The risk of the exercise by government of the powers thrust upon it by the *BEM* decision is neither speculative nor uncertain. The FCC has itself recognized the inconsistency of *BEM* with the First Amendment, observing in its petition for reconsideration of the decision of the Court of Appeals that:

> ". . . it is important to note that the Commission is the Government. It has been careful to tailor its actions in the fairness and related fields so as not to become in effect the broadcast journalist or programmer. Such inappropriate supervision by the Commission would clearly stifle 'uninhibited, robust, and wide-open' debate, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), and be contrary to the First Amendment. But that is what the Court has invited as a consequence of its approach. How is the Commission, the Government, to review licensees' actions refusing

> *some* requests on grounds that, for example, the viewpoint sought to be expressed is not only similar to that already afforded advertising time, but that too much time has already been allotted this particular narrow viewpoint (assuming *arguendo* that a refusal on this ground is permissible under the First Amendment)? We believe that whether reviewing particular actions or formulating general guidelines, this is precisely the kind of quagmire which the Government must avoid." (Brief of FCC re petition for consideration, pp. 8-9)

Both opponents and supporters of the *BEM* decision have remarked upon its incompatability with bedrock First Amendment theory. Thus, Clay T. Whitehead, Director of the Office of Telecommunications Policy of the Executive Office of the President, recently observed that "When the faulty logic of the *BEM* case is exposed, all that remains is the effort to control content in broadcasting because it is an important and effective communications medium, and this effort, the Constitution forbids." (Address by Clay T. Whitehead, April 10, 1972)

A sympathetic student observer of the *BEM* decision, recognizing its inconsistency with long-established First Amendment law, has observed that problems with the ruling

> ". . . could be avoided by relaxing to a limited extent the constitutional principles against content discrimination and regulatory discretion. This limited relaxation seems warranted where, as here, speech is being regulated to advance first amendment interests rather than to balance other valid governmental regulatory interests against those of the first amendment. More would be lost by curtailing the government in its attempt to advance first amendment interests than would

> be risked by developing standards for selection of which advertorials to air." (85 HARV. L. REV. 689, 697-98 (1972))

Simply put, we submit that the "constitutional principles" involved are too significant to be subjected to such "relaxation."

Given the restrictions inherent in the First Amendment in government activities in this area, it is hardly surprising that when the identical issue posed by this case has arisen with respect to privately owned newspapers, courts have been virtually unanimous in holding that advertisements may be declined in the judgment of the newspapers involved. In the leading recent case of *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971), the Court of Appeals for the Ninth Circuit, observing that government and press had a "history of disassociation", 440 F.2d at 136, responded to the contention that a newspaper was obliged to accept an advertisement against its will as follows:

> "Appellant has not convinced us that the courts or any other governmental agency should dictate the contents of a newspaper.
>
> "There is no difference between compelling publication of material that the newspaper wishes not to print and prohibiting a newspaper from printing news or other material." (440 F.2d at 135)

Among other cases so holding, see, *Chicago Joint Board* v. *Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 29 L.Ed.2d 138 (1971); *Resident Participation of Denver, Inc.* v. *Love*, 322 F.Supp. 1100 (D. Colo. 1971) (three-judge court); *Jewish Defense League* v. *New York Times*, —— F.Supp. —— (S.D.N.Y. 1971); *Bloss* v. *Fed-*

erated Publications, Inc., 5 Mich.App. 74, 145 N.W.2d 800 (1966); *Lord* v. *Winchester Star, Inc.*, 346 Mass. 764, 190 N.E.2d 875 (1963); *cert. denied*, 376 U.S. 221 (1964); *Commonwealth* v. *Boston Transcript Company*, 249 Mass. 477, 144 N.E. 400 (1924); *Shuck* v. *Carroll Daily Herald*, 215 Iowa 1276, 247 N.W. 813 (1933); *Mack* v. *Costello*, 32 S.D. 511, 143 N.W. 950 (1913); *Approved Personnel, Inc.* v. *Tribune Co.*, 177 So.2d 704 (Fla. Ct. App. 1965); *Friedenberg* v. *Times Publishing Co.*, 170 La. 3, 127 So. 345 (1930); *In re Louis Wohl, Inc.*, 50 F.2d 254 (E.D. Mich. 1931); *Poughkeepsie Buying Service, Inc.* v. *Poughkeepsie Newspapers, Inc.*, 205 Misc. 982, 131 N.Y.S.2d 515 (Sup. Ct. Orange Co. 1954).*

To all this, we are met with the argument that broadcasting is so different from newspapers that a different First Amendment result is dictated. We are further told that *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) supports and indeed compels this conclusion. We disagree.

The Red Lion Decision

Of course, in *Red Lion* this Court upheld the constitutionality of the personal attack and political candidate editorial requirements of the fairness doctrine as then embodied by Congress in Section 315 of the Communications Act (47 U.S.C. § 315). In doing so, the Court—over the objections of NBC and other broadcast licensees—held

* The only case of which we are aware to the contrary is *Uhlman* v. *Sherman*, 22 Ohio N.P. (n.s.) 225, 31 Ohio Dec. 54 (1919). That decision was later rejected as persuasive authority in Ohio in the case of *Sky High Theater, Inc.* v. *Gaumer Publishing Co.* (unreported, No. 228220), cited in *Bloss* v. *Federated Publications, supra*, at 804. The *Uhlman* decision has also been aptly characterized as the single "exception" to the rule that "has been uniformly held" that a private publisher is under no legal obligation to sell advertising to those who apply for it. Annot., "Right of Publisher, Newspaper or Magazine to Refuse Advertisement", 87 A.L.R. 97 (1933).

that the nature of the First Amendment protections applicable to broadcasting was somewhat different than that available to the privately owned print press. Basing its decision upon the limited amount of frequencies available for use and the government licensing power over broadcasters, the Court held that some government regulation of what broadcasters must present as a *direct* consequence of what they initially broadcast was proper so as to insure that persons attacked be given the opportunity to respond.

Differences between this case and *Red Lion* are vast. In *Red Lion* this Court did not pass upon the constitutionality of any action, such as in the present case, which could deprive broadcasters of the right to determine in the first instance which issues and points of view should be broadcast. Further, in its *Red Lion* opinion, the Court—answering the argument of broadcast licensees that the personal attack rule could lead to content control by government—indicated that "more serious First Amendment issues" might be raised in situations in which the government played a more significant role with respect to program content. (395 U.S. at 396) That, of course, is precisely the present case.

For all its import, *Red Lion* merely held constitutionally permissible under the First Amendment an FCC Rule embodied in an act of Congress. This Court did not hold that a fairness doctrine was constitutionally compelled. Nor did it suggest that the FCC would have acted unconstitutionally by issuing rules other than those upheld in *Red Lion*. The contention that *Red Lion* in any manner requires a result such as that reached in *BEM* is simply unsupportable.

Nor does *Red Lion* lend any support to the distinction offered by the Court of Appeals of this case from those involving privately owned newspapers. The Court of

Appeals' contention that acts of broadcast licensees unlike those of privately owned newspapers are, in effect, "state action" is unpersuasive, as well as being contrary to extensive precedent. Such a holding, which analogizes broadcast licensees to government-owned television stations, must certainly come with surprise to those government officials who have criticized television stations for their coverage of national events. It is contrary in theory to the *Times-Mirror, Chicago-Tribune* cases and the like which hold—with substantial historical support—that the function of the press has historically been that of critic and watch-dog of government. It is also contrary to the specific holdings of cases such as *McIntire* v. *Wm. Penn Broadcasting Co. of Philadelphia,* 151 F.2d 597 (3d Cir. 1945), *cert. denied,* 327 U.S. 779 (1946). That case involved a federal action by a clergyman whose broadcasting contracts had been broken by defendant's radio station. The court affirmed the dismissal of the complaint on the ground that it failed to state a federal cause of action, stating that:

> "The First Amendment was intended to operate as a limitation to the actions of Congress and of the federal government. The defendant is not an instrumentality of the federal government but a privately owned corporation." (151 F.2d at 601)

Accord, *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.,* 183 F.2d 497 (1st Cir. 1950); *Post* v. *Payton,* 323 F.Supp. 799 (E.D.N.Y. 1971).* Cases such as these

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* In *Post* v. *Payton, supra,* responding to the argument that *Red Lion* established the proposition that action of a broadcast licensee constituted "governmental action" the Court observed:

> "Plaintiffs' reliance upon Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969), is misplaced. In that case the Supreme Court did not hold that the licensee's actions were

are now dismissed by the Court of Appeals as "doctrinal impedimenta" cleared away by *Red Lion*. (A. 456) In fact, *Red Lion* addressed itself to nothing of the sort. It did not deal with the concept of state action; it did not hold that television stations are instrumentalities of the federal government; least of all did it purport to reverse, *sub silento, McIntire, Hildreth* and the numerous cases holding it constitutional for the press to decline, in its discretion, to publish advertisements.*

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governmental action. It merely ruled that a broadcast licensee's First Amendment rights were not abridged by Congress or the Commission by the application of the latter's 'fairness doctrine' or the regulations and orders promulgated thereunder." (323 F.Supp. at 803)

And that:

"Here the broadcast licensee is a private entity, acting neither in behalf of, nor as agents for, the Federal government, nor is the licensee performing a governmental function, such as delivery of the mails. The Government is not charged with the duty of broadcasting or formulating the program of any particular radio station. In fact, the Communications Act of 1934 exclusively reserves station programming to the licensee, free of any censorship by the Commission. 47 U.S.C. § 326; McIntire v. Wm. Penn Broadcasting Co. of Philadelphia, *supra*; Massachussetts Universalist Convention v. Hildreth & Rogers Co., *supra*. It is only governmental action which can violate the First and Fourteenth Amendments, as held, for example, in The Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883). To hold that the licensing by the Federal Government of a broadcast frequency endows the recipient with the quality of an agency of the Federal Government would be an unreasonable interpretation of governmental action." (*Id.* at 803-04)

* The submission of the Court of Appeals that actions of broadcast licensees are in effect "state action" is also both tautological and circular. As Clay T. Whitehead, Director of the Office of Telecommunications Policy of the Executive Office of the President, recently observed:

"The *BEM* tautology is that, in the past, something unique about broadcasting justified extensive government involvement, now the extent of government involvement is the thing

Red Lion also lends no support to the basic thrust of the opinion below that it is unconstitutional for television stations to have a policy against the acceptance of all editorial advertisements because of the "most important" First Amendment value of "individual self-fulfillment through expression."* (A. 467) Whatever may be the psychotherapeutic rewards of self-fulfillment, they have little to do with the First Amendment. The core purpose of the First Amendment, after all, is not that of soothing the ruffled ego of a speaker unable to find a forum to his liking. Benjamin Franklin is reported to have said that his newspaper was not a stagecoach with seats for everyone. F.L. MOTT, AMERICAN JOURNALISM 55 (3d ed. 1962) Neither *Red Lion* nor the First Amendment says anything to the contrary.

The opinion of the Court of Appeals is one which by misreading the First Amendment ultimately undervalues

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that makes broadcasting unique. This kind of logic is specious and cannot support unique treatment for broadcasting under the Constitution." (Address of Clay T. Whitehead, *supra*, p. 12)

* The other First Amendment interests referred to by the Court of Appeals are already fully protected—to the extent protection is required—by the fairness doctrine and the administrative processes. The right of the public to "suitable access to social, political, esthetic, moral and other ideas and expressions" (A. 465) is itself the basis upon which *Red Lion* sustained the challenged constitutionality of the personal attack and political editorial aspects of the fairness doctrine. See 395 U.S. at 390. The interest of the public in "uninhibited" debate (A. 466) is also referred to in *Red Lion* but it cannot be postulated that the public is not now receiving such debate. There was no evidence before the Court of Appeals—and there is no evidence before this Court—on the basis of which a factual finding could properly have been premised and, indeed, there is a good deal of evidence precisely to the contrary. (See, *e.g.*, A. 67-154. See also, *infra*, pp. 20-21 of this brief.) Additionally, we respectfully submit that decisions such as these are, at least in the first instance, properly made only by the Commission and not the courts.

it. After all its discussion of the constitutional rights of individuals to appear on television, the Court of Appeals concludes that this "right" of the public is "abridgeable", since it must be subject to inherent limitations of time actually available for sale on television. It is also abridgeable, in the view of the Court of Appeals, in that the "right" of access involved is apparently only to be given effect if the broadcaster carries commercial advertising.* (A. 467, 474-477) By this reasoning, non-commercial educational television stations would presumably be exempt, as would any privately owned station that accepts no commercial advertisements. It is surely an odd First Amendment right that in its very definition is deemed so easily subject to abridgement. The First Amendment, when correctly interpreted, has historically meant more.

The decision of the Court of Appeals is inconsistent with *Red Lion* in still another fashion. In *Red Lion*, the Court upheld the constitutionality of the personal attack requirement of the fairness doctrine as then embodied in § 315 of the Communications Act (47 U.S.C. § 315) which permitted broadcasters to deny access to all candidates for any political office so long as such denial was applied consistently. *Cf. John P. Crommelin*, 19 P & F Radio Reg. 1392 (1960). The opinion of the Court of Appeals, if encompassing paid

* This is apparently argued in an effort to bring the case within those lower court decisions holding that when a public body opens itself to one kind of speech, it cannot "discriminate" by barring another. Of course, these decisions apply only to "public" bodies. Moreover, whatever the responsibility may be of the Port of New York Authority, the New York City Transit Authority or the like not to bar the presentation of controversial political views after allowing the presentation of commercial advertisements, the broadcast industry is already surfeited with controversial political speech. It is already obliged by the "public interest" requirements of the Communications Act to present views of all significant sides of public issues that are discussed on the airwaves. There is no claim in the present case of any failure to do so.

editorializing by political candidates, is therefore squarely at odds with § 315 as it existed at the time of *Red Lion* and with *Red Lion* itself. If the opinion is to be read as somehow excluding candidates from its coverage a still more egregious result would follow, since such a reading would afford non-office seekers greater First Amendment rights than those seeking political office. Such an anomalous result can hardly be said to be required by, or even consistent with, the First Amendment.

We close with a final constitutional observation. This Court has rarely been called upon to render so significant a constitutional opinion on so frail a factual record. Justice Brandeis, early in his career, wrote that a constitutional judgment of this Court "should be based upon a consideration of relevant facts, actual or possible—*Ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law." *Adams* v. *Tanner*, 244 U.S. 590, 597, 600 (1917) (Brandeis, J., dissenting). See also, *Burns Baking Co.* v. *Bryan*, 264 U.S. 504, 517, 520 (1924) (Brandeis, J., dissenting). And see K. L. KARST, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75.

In the present case, there is not a single word in the record which even suggests that the public has been denied access to the widest range of views as to controversial subjects. Not only has the Court of Appeals totally disregarded the expertise of the FCC*: it has proceeded to issue its own "clarion call" for judicial "activism" (A. 457) unrestrained by a single relevant fact which might have affected its decision as to how to rule. This is particularly striking

* In doing so, it has again acted in a fashion flatly contrary to *Red Lion* in which this Court stressed its reliance upon the expertise of the Commission (395 U.S. at 381-386). We join the FCC and the United States in seeking reversal on this ground.

in light of the facts before the Court in both *BEM* and *DNC*. Not even the most casual television viewer, we submit, could disagree with the judgment of the Court of Appeals for the District of Columbia in *Green* v. *FCC*, 447 F.2d 323 (D.C. Cir. 1971), that issues relating to the Vietnam War "have been ventilated *in extenso* for years on (probably) every television and radio station in the land." * (447 F.2d at 330.) Nor, we submit, can it be seriously argued that the Democratic Party has been unduly restricted in its presentation of views as to the state of the nation, its needs for funds, or any other issue. See, *e.g.*, *Democratic National Committee* v. *FCC*, —— F.2d —— (D.C. Cir. 1972), *petition for cert. filed*, 40 U.S.L.W. 3528 (May 9, 1972).

Indeed, the *BEM* decision does not hold that as to *any* single issue the public has been denied access to the broadest range of partisan views. Yet on this barren record the Court of Appeals has issued its "clarion call", has imposed far more pervasive governmental control over broadcasting, and has fashioned what are, at best, novel First Amendment rules which are hereafter to bind broadcasters, the Commission and Congress alike. We respectfully submit that the First Amendment deserves better of this Court.

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* The submission by CBS (A. 66-170) of its programming with respect to Vietnam (to which NBC could add a lengthy submission) merely demonstrates the accuracy of that which the Court of Appeals had previously held in *Green* v. *FCC*, *supra*.

CONCLUSION

The decision of the Court of Appeals is contrary to the First Amendment and should be reversed.

Respectfully submitted,

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